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IN THE

Supreme Court of the United States

No. 358. OCTOBER TERM, 1941.

EMIL STEIN,
Petitioner and Appellant below,

vs.

PRESTON DELANO, Comptroller of the Currency, and ROGER E. BROOKS, substituted for E. LORRY KEETON, Receiver of the NEW JERSEY NATIONAL BANK & TRUST COMPANY OF NEWARK, NEW JERSEY,
Defendants and Appellees below.

On Petition for Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Attorneys for and of Counsel with Petitioner.
744 Broad Street,
Newark, N. J.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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PETITION FOR REHEARING

Comes now Emil Stein, the petitioner in the above-entitled cause, and presents this, his petition, for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I.

1. The meritorious federal question in this case is national in scope, and involves the determination of whether local law governing commercial transactions between deb-

tor and creditor is decisive of the issue of whether or not depositors of a national bank in liquidation are entitled to moratory interest after acknowledging the receipt of the full principal of their claims. *

2. That the question of federal law here involved is not confined to the instant case, but is of national importance, is evident from the failure of the Comptroller to oppose the original application for the writ, and from the following statistics, which appear in the Annual Report to Congress of the Comptroller of the Currency covering the year ended October 31, 1940. These relate to the locations of, and the amount of money involved in, national bank liquidations, *final distributions in which, await and depend upon the decision in the case at bar:*

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* The District Court for the District of New Jersey conceded in so many words that under New Jersey local law, acceptance of the full principal of a debt extinguished the right to thereafter collect moratory interest thereon. Such local law, however, was not applied because the court felt that the liquidation of a national bank created an exception to the general rule. 35 Fed. Supp. 260. The Circuit Court of Appeals affirmed the District Court. 121 Fed. 2nd 975. This Court denied *certiorari* October 13, 1941.

Name of Bank and Location	Amount of Outstanding Cap. Stock Upon Receivership	Am't of Claims Proved and Allowed	Approx. Cash Available as Int. to Depositors, or to be Returned to Stockholders
California Natl. Bank, Sacramento, Cal.	$ 2,000,000	$ 7,412,473	$ 91,727
Natl. Bank of Niles Center, Ill.	100,000	853,380	69,670
1st Natl. Bk. of Marshall Co., Ind.	130,000	726,023	21,113
Essex Natl. Bank, Haverhill, Mass.	1,000,000	2,166,636	30,527
1st Natl. Bank, Detroit, Mich.	25,000,000	335,845,000	23,000,000*
N. J. Natl. Bk. & Tst. Co., Newark, N. J.	2,800,000	5,269,654	425,901
1st Natl. Bk. in Salem, Oregon	200,000	811,884	59,208
Bk. of Pittsburgh Nat. Assoc., Pa.	3,000,000	26,344,806	1,124,270
1st Natl. Bk. of Cannonsburg, Pa.	200,000	1,780,989	174,363
County Natl. Bank, Clearfield, Pa.	500,000	3,044,270	283,830
1st Natl. Bank of Joliet, Ill..	1,040,000	3,269,243	68,167*
TOTALS	$35,970,000	$387,524,358	$25,348,776

* The foregoing statistics are taken from Table No. 68 of the Appendix attached to the Comptroller's Report, and are accurately transcribed with two exceptions:

(a) With respect to the Detroit bank, the report on page 353 shows cash in the comptroller's hand of $30,326,367, but with only an 80% dividend having been paid. On pages 39 and 40 in the body of the report, however, it is stated that provision had been made for the payment of a 20% dividend (thus completing 100% of principal), and that thereafter there would still be a surplus of approximately $23,000,000. On January 22, 1941 the New York Times stated on its financial page that on the preceding day D. C. Schram, receiver of the bank, had announced a $28,000,000 surplus after paying depositors 100% of their claims.

(b) With respect to the Joliet, Ill., bank the report on page 341 shows cash in the comptroller's hands of $133,552, but with only a 98% dividend having been paid. Deducting 2% of $3,269,243 (the amount of the claims allowed) to make up the full 100% still leaves a cash surplus of approximately $68,000.

3. The Comptroller's report, on page 40, is enlightening on the number of depositors involved in the liquidation of only one bank—the 1st Natl. Bank of Detroit. Originally there were 565,845 claimants. As a result of combinations, etc., there were at the date of the report 153,275 claimants exclusive of the owners of 28,900 inactive ac-

counts. If your Honors will consider also the probable number of stockholders of that institution (the figures as to which do not appear in the report), you will have an idea of the number of persons involved in the Detroit liquidation. Again, if your Honors will proportionately reduce the number of depositors and stockholders involved in the other liquidations mentioned in the above schedule—according to the size of the banks—you will have an idea of the number of people whose rights depend upon the outcome of this case. It is probably no exaggeration to say that the interested parties number at least a quarter of a million, stretching clear across the country from California to Massachusetts. According to the above statistics, the case at bar will set a standard for the distribution of at least $25,000,000. Besides, the continued liquidation of the various banks during the past year has probably produced additional cash for distribution.

4. For the reasons set forth under II *infra*, your petitioner did not have the detailed statistics herein set forth at the time the petition for *certiorari* was filed, and consequently was unable to present them to the Court at that time. Likewise it was not therein set forth in detail how desirable, and in fact imperative, it was and is for this Court to authoritatively settle the questions involved herein, so that the rights of so many people will be adjudicated, and a possible multiplicity of suits involving the same question avoided. One such suit has already been started (Par. 9, *infra*).

5. An expression by this Court on the meritorious question herein will have the two-fold effect of (1) settling a question which has perplexed the Comptroller's office to the extent that all liquidations having surpluses have

been held up pending the conclusion of this case (see schedule in par. 2, *supra*), and (2) having the "National Banking Act" clearly interpreted with respect to the payment of moratory interest to depositors in liquidations. At present the "Act" is silent regarding interest (Appendix, Title 12 U. S. C., Sec. 194). A decision upon the merits herein might even lead to Congressional action which would expressly leave the question either to local law or to the federal statute as an attribute of a federal institution. In any event the national scope of the question under consideration cannot be over-emphasized.

II.

6. When the petition for *certiorari* was filed, the full import of the decision of the Circuit Court was not known or realized by petitioner. Petitioner did not then know that there are now pending in the Comptroller's Office, *seventeen* liquidations of National banks in which surpluses have remained after payments to creditors of one hundred per cent of the principal of their claims (at the date of the aforementioned Comptroller's report, there were only eleven such liquidations). Petitioner was under the impression that the within suit was the only one pending involving the question of whether the surpluses belonged to the depositors or stockholders. Petitioner was not aware that the Comptroller was withholding final distributions in all these liquidations, and that he awaited and depended upon the final determination of the within suit.

7. The detailed statistics referred to under "I", *supra*, showing the national importance of the decision in this case

were not set forth in the petition for *certiorari* because petitioner was under the impression that the Comptroller of the Currency intended to and would join in the prayer for the allowance of the writ. Such action would have unequivocally indicated that a decision on the merits in this case would affect not only those persons financially interested in the New Jersey National Bank and Trust Co., but the stockholders and depositors of the other national banks in liquidation all over the country. Petitioner felt that an application for a writ joined in by the Comptroller would of itself have established the paramount importance and national scope of the questions herein to warrant favorable action by this Court.

8. The Comptroller of the Currency has indicated that he is desirous of having this Court pass upon the merits, for in his letter of September 17, 1941 to petitioner's counsel, he says:

> "* * * The question of payment of interest to depositors is an important one that has not been passed on by the Supreme Court in years and, as the record indicates, *we do not oppose a review.*" (Italics ours—Appendix, Ex. II.)

The letters (Appendix, Ex. I and II), petitioner submits, explain the absence from the application for *certiorari* of the detailed information set forth herein. True, the Comptroller doesn't in so many words say that he had agreed to join in the petition for *certiorari*. And it is barely possible, though not probable, that petitioner's counsel may have been unduly optimistic in interpreting the Comptroller's promise of cooperation—admittedly made at the outset of this litigation. Concededly, the Comptroller's office does

"not oppose a review" of the meritorious questions by this Court. And while litigants before this Court cannot stipulate for a writ, they can by their conduct convey to the Court how important they feel the matter really is. It is easy to read between the lines of the Comptroller's letter dated September 17, 1941, that a review by this Court was desired. What other construction can be placed upon his reference to the allowance of a writ in the last national bank receivership case before this Court—in which the Comptroller offered no opposition!

9. The question involving the distribution of surplus between depositors or stockholders is the subject of pending litigation in the Detroit bank liquidation. According to the Comptroller, the District Court in Michigan has decided the issue in favor of the depositors, but the case has been appealed to the Circuit Court of Appeals. (Apparently, the lower court opinion has not yet been reported.) This offers a concrete reason for having the merits reviewed in this case. It will probably settle the question once and for all, and thus avoid a multiplicity of suits. Certainly the expense of repeated litigation involving the same meritorious question would not be warranted if this Court accepted this case, and decided this perplexing issue.

10. The fact that in a number of national bank receiverships interest may have been paid to depositors as the Comptroller's adopted administrative procedure, is not controlling or even persuasive on the issue. Local law, such as obtains in New Jersey, may not have been applicable in any previous liquidation. And a Treasury Department practice previously adopted in 300 cases was rejected by this Court recently because it conflicted with judicial decisions. *Sanford* v. *Com. of Int. Rev.*, 308 U. S. 39 (1939).

III.

11. This Court may have felt that *certiorari* should not have been granted, because the original petition did not sufficiently present the general importance or the national scope of the question. We think that the reasons under "II", *supra,* completely explain this deficiency (if it may be termed that) in the original petition.

12. This Court may also have felt that *certiorari* should have been denied because of the apparent unanimity of result in the cases dealing with the distribution of the surpluses over 100% dividends to depositors. In this connection petitioner desires to point out that in only two cases can it be said that the issue was squarely raised:

> *Nat'l Bk., etc.* vs. *Mechanics Nat'l Bk.,* 94 U. S. 437 (1877);
> *Richmond* v. *Irons,* 121 U. S. 27 (1887).

And while the result in each case was that depositors received the surpluses as moratory interest, that is entirely consistent with petitioner's contentions in this case. In the *Mechanics Nat'l Bk.* case *this Court applied New York local law*—the case came up from New York—which recognized duly allowed claims in receivership matters as tantamount to judgments. And since judgments bore interest in New York, the acceptance of the face amount of the principal as such did not extinguish the right to moratory interest. In the *Richmond* vs. *Irons* case, a similar situation existed. The case came up from Illinois which has a statute providing for interest upon judgments. So, in allowing the

depositors moratory interest, this Court may be said to have again applied local law.

13. *But New Jersey has no statute allowing interest upon judgments.* In New Jersey if a judgment debtor pays the face amount of the principal of a judgment, and it is accepted as such, the creditor may not thereafter claim any moratory interest. That may seem peculiar—but it is New Jersey local law. And if the lower courts had applied New Jersey local law in this case—instead of declaring that the mere liquidation of a national bank created an exception to the general rule—the surplus would have been distributed to the stockholders.

14. The *Mechanics Natl. Bk.* case was decided in 1877, the *Richmond* case in 1887. Needless to say, time has wrought vast changes in the law since 1877—not the least of which has been the decision of *Erie R. R.* vs. *Tompkins,* 304 U. S. 64 (1938). And more and more the Courts are stressing the importance of applying local law, wherever possible, in the federal courts, even to the extent of applying local statutes of limitations to suits upon assessments arising out of national bank liquidations. *Pufahl* v. *Parks,* 299 U. S. 217 (1936); *Rawlings* v. *Ray,* 312 U. S. 96 (1941). Whether the presence of a federal statute, itself indeterminate of the issue in controversy, completely ousts the application of *Erie* v. *Tompkins, supra,* and *Jackson Co.* v. *U. S.,* 308 U. S. 345 (1939) is not only the basic meritorious question at bar, but also a matter of great concern to the bench and bar of the nation. That such a problem begs settlement seems obvious.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that the order denying *certiorari* be vacated, and the writ of *certiorari* be allowed.

Respectfully submitted,

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Counsel for Petitioner.

Certificate of Counsel.

We, SAUL J. ZUCKER, and LIONEL P. KRISTELLER, counsel for Emil Stein, the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

SAUL J. ZUCKER,
LIONEL P. KRISTELLER,
Counsel for Petitioner.